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NO. 195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

A. C. WILLINGHAM, *Petitioner*
v.
THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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This supplemental brief is filed because of the statements appearing in Paragraph (c) at Pages 10-12 of the Government's brief in opposition to the petition for writ of certiorari. In that paragraph the Government disputes the materiality of Petitioner's claim of overpayment of tax based on carryover losses from 1949 and 1950 to the indictment years of 1952 and 1953. In support of its peti-

tion the Government argues that adjustment for either of the indictment years based on such losses would now be barred by limitation. The Government argues further that adjustment for 1953 based on 1950 losses has not been claimed in currently pending Tax Court proceedings under Docket No. 89847 wherein both indictment years and other tax years are in controversy. In this connection the Government points out that there was a concurrent sentence imposed herein for both 1952 and 1953 and argues that the failure to assert adjustment for 1953 in the Tax Court proceeding therefore results in no reversible error as to Petitioner in this case. (The Government cites *Hirabayashi v. United States,* 320 U.S. 81, 85; *Classen v. United States,* 142 U.S. 140, 146, at page 12 of its brief.)

In reply it is necessary first to observe that the charges on which this Petitioner was convicted were that he returned an income and the corporation in question paid tax thereon which as to each indictment year were less than actual income and tax due. Under the cases and the plain terms of the indictment it could make no difference, even if it were true, that this Petitioner had failed to claim a refund or adjustment for the years in controversy.* The reason is that if the income and tax returned and paid by Petitioner were in fact greater than the tax due from the corporation, then there could be no fraud on the Government. By the same reasoning it could make no difference at this late date whether a claim form refund or adjustment were barred as to either tax year The only question is whether or not there was in fact an understatement of income and tax in the return as filed.

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*Long line of cases on this carried at Page 11 of Petitioner's application.

Of course, as to both indictment years it is plain from the current Tax Court proceedings in Docket No. 89847 as cited by the Government that the amount of tax for 1952 and 1953 and other years is now in controversy. It is apparent from the Government's having brought the suit that the years 1952 and 1953 are open by virtue of an extension, or at least a Government claimed extension of the limitation period. Contrary, however, to the Government's argument as to Gulf Southwestern's position in the Tax Court proceedings, it is the fact that the company did claim tax adjustment for 1953 which is identical with the adjustment contended for in this case. Although in the petition for redetermination the company's position with respect to 1953 is not spelled out with the same particularity as the claim for carryover loss for 1952, nevertheless the pleadings therein are absolutely plain. After explaining the mechanics of carryback and carryover of the corporate loss of $58,485.20 for the year 1949 resulting in overstatement of income for the year 1952, the petition states, "The Commissioner allowed a net operating loss deduction of $2,243.39 to be carried forward and deducted in Petitioner's tax return for the taxable year ended December 31, 1952." In the sentence immediately following, the petition then adds that "Petitioner's accounts and income tax return for calendar year 1950 reflect a net operating loss of $28,490.87 instead of $736.93, as apparently allowed by the Commissioner ($2,243.39 less 1951 loss $1,506.46)." The implication of adjustment by carry over to the tax year 1953 is quite plain. It follows not only as a matter of reasonable construction of the pleadings, but also as a matter of law that the loss of $28,490.87 for 1950, which is the same loss figure here asserted, would carry over to

that year. The pertinent section of the Code reads as follows:

> "(B) Loss of taxable year beginning after 1949.—If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss *shall be a net operating loss carry-over* for each of the five succeeding taxable years, . . ." (Revenue Act of 1950, Section 215) (Emphasis supplied)

Conclusion

For the reasons set forth in the original Petition for Writ of Certiorari, as here supplemented, it is urged that said writ should be granted.

Respectfully submitted,

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